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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of	
Implementation of the Telecommunications Act of 1996	
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	CC Docket No. 96-238

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, offers the following comments on various Petitions for Reconsideration and Clarification of the *Report and Order* in the Commission's Formal Complaint Proceeding:

- TRA supports the expansion of the five-month complaint resolution timeframe of the *Report and Order* to apply to all formal complaint proceedings touching upon competitive issues, not merely complaints concerning "the lawfulness of matters included in tariffs filed with the Commission."

- The Accelerated Docket procedure envisioned by the Commission will serve a discrete and indispensable role in the identification and investigation of actions by common carriers that may be hindering competition in telecommunications markets and the initiation of actions where necessary to remedy conduct that is unreasonable, anti-competitive or otherwise harmful to consumers. Thus, even the expansion of the *Report and Order*'s resolution timeframe to encompass all competition-related formal complaints will not -- indeed, cannot -- obviate the need for an even more accelerated forum devoted specifically to the adjudication of complaints brought by telecommunications service providers seeking to alleviate impediments to competition.

- TRA also supports MCI's request that the Commission retain Section 1.730 of the Commission's Rules in order that requests for document production, the ability to take depositions and to issue additional interrogatories will remain available to carriers as means to ensure the development of a sufficiently detailed formal complaint record.

- The Commission should refrain from expanding the pre-filing notice requirements contained in the *Report and Order*. Unlike the proposed modifications, the existing notification requirements adequately inform defendant carriers of the potential claims to be raised against them without interjecting procedural uncertainty into the formal complaint process.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits its comments on various Petitions for Reconsideration and Clarification of the *Report and Order*, CC Docket No. 96-238, FCC 97-396 (released November 25, 1997), filed in the above-captioned matter ("*Report and Order*"). Petitions have been filed by Airtouch Paging

[1] A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote landline and wireless telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services.

("Airtouch"),[2] America's Carriers Telecommunication Association ("ACTA"),[3] AT&T Corp. ("AT&T),[4] and MCI Telecommunications Corporation ("MCI").[5]

I.

INTRODUCTION

A long-standing and ardent proponent of a mandatory, efficiently-streamlined, highly expedited and fully-binding process for the prompt and equitable resolution of carrier-to-carrier disputes, TRA has been an active participant in this proceeding and believes that through its revision of existing formal complaints rules, the Commission has gone far toward achieving its stated intent of eliminating and/or streamlining heretofore cumbersome and unnecessary formal complaint procedures and pleading requirements. Like petitioners here, TRA urges the Commission to expand the *Report and Order*'s five-month complaint resolution deadline to encompass a broader range of formal complaints than simply those complaints "which involve 'investigation[s] into the lawfulness of a charge, classification, regulation or practice' contained in tariffs filed with the Commission."[6] The Commission's enunciated goal of speeding the resolution of all formal complaints would be better served, in TRA's opinion, by extending the *Report and Order*'s five month complaint resolution requirement to all competition-related formal complaints.

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2 Petition for Partial Reconsideration, filed February 9, 1998.

3 Petition for Reconsideration, filed January 20, 1998.

4 Petition for Clarification, filed February 6, 1998.

5 Petition for Reconsideration, filed February 6, 1998.

6 *Report and Order*, FCC 97-396, at ¶ 37.

In urging this modification, TRA stresses the continuing need for the specialized, accelerated docket procedure currently under consideration by the Commission. The proposed Accelerated Docket for the resolution of complaints alleging actions by common carriers which hinder the development of telecommunications competition or which are otherwise unreasonable, anti-competitive or adverse to consumer interests, is sufficiently distinct in focus to form a useful, and necessary, adjunct to the Commission's newly-streamlined general formal complaint processes. Establishment of the proposed Accelerated Docket alternative forum will thus notably advance the Commission's efforts to promote "full and fair competition in all telecommunications markets"[7] by providing an essential forum for critically time-sensitive competitive situations not otherwise specifically addressed by the *Report and Order*. And contrary to the assertion of Airtouch, the critical need for an accelerated docket procedure is neither obviated nor diminished by the modifications to the *Report and Order* supported herein.

TRA supports MCI's request that the Commission retain Section 1.730 of its Rules, pursuant to which carriers may request, in appropriate circumstances, certain types of "extraordinary" discovery.[8] The continuing availability of discovery mechanisms such as requests for document production, the ability to take depositions and to issue additional interrogatories will take on increased significance as the Commission pursues its goal of speeding "the resolution of all formal complaints, not just those covered by the Act."[9] Indeed, access to these discovery

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7 *Id.* at ¶ 5.

8 47 C.F.R. § 1.730.

9 *Public Notice*, "Federal Communications Commission's Revised Procedures for Filing Formal Complaints Against Common Carriers Become Effective March 18, 1998" (released March 9, 1998).

devices may in certain cases be the determinative factor in whether a sufficiently detailed record can be developed in a particular formal complaint action to satisfy the dictates of due process.

Finally, TRA opposes AT&T's request that complainants serve pre-filing letters not only upon a defendant carrier's designated agent but also "the defendant's representative that, to the best of complainant's knowledge, has decision making authority over the disputed matters or has been designated as the defendant's attorney regarding those matters." Adoption of such an amorphous standard would introduce an unnecessary element of uncertainty as complainant carriers are forced to evaluate whether they have adequately complied with the pre-filing notice requirements, leaving virtually every formal complaint vulnerable to procedural attack by defendant carriers anxious to frustrate the formal complaint process.

II.

ARGUMENT

A. The Commission Should Expand the Scope of Complaint Proceedings Entitled to the Five-Month Resolution Timeframe Set Forth in the *Report and Order*

TRA agrees with the Commission that "more dialogue between parties prior to the complaint process will reduce, and in some cases, eliminate, the need to file formal complaints with the Commission."[10] Experience demonstrates, however, that carrier-to-carrier disputes over such critical competitive matters as provisioning, maintenance, repair and billing can frequently be settled equitably only upon resort to an independent authority capable of rendering a decision which will be binding upon both parties. And as an increasing number of service providers endeavor to enter the local telecommunications market, the Commission will more and more

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10 *Report and Order*, FCC 97-396, at ¶ 21.

frequently be called upon to resolve through its formal complaint process allegations of anticompetitive and/or discriminatory behavior arising from carrier use (or misuse) of customer-specific information or other efforts to benefit from historically protected incumbent status.

It is beyond dispute that the above-mentioned concerns are inexorably tied to a carrier's ability to contribute to the "widespread competition [which] will ensure that the American public derives the full benefit of such competition through new and better products and services at affordable rates."[11] The *Report and Order*, unfortunately, provides no assurances that such critical concerns will be resolved within a particular timeframe. Only complaints specifically limited to "the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation,"[12] are guaranteed to be resolved by the Commission within a five month period.

As set forth in TRA's comments in support of the adoption by the Commission of an Accelerated Docket procedure, TRA strongly supports a requirement that all carrier-to-carrier complaints raising critical competitive issues such as the above must be resolved promptly if that resolution is to have any realistic meaning for the aggrieved carrier. 180 days is an exceedingly protracted period of time to a carrier which is materially hindered, perhaps even prevented, from fulfilling its obligations to its own customers during the pendency of a complaint action, and as the Commission is all too aware, delay consistently works to the advantage of the incumbent provider. As currently structured, however, the *Report and Order* does not afford carriers with the assurance that their claims of anticompetitive or discriminatory treatment at the hands of their

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11 *Id.* at ¶ 1.

12 *Id.* at ¶ 37.

underlying providers can be resolved within even this protracted 180 day period. The damage to competition which will likely result from a carrier's inability to obtain swift relief whenever discriminatory or anticompetitive behavior is encountered, not merely when "the lawfulness of matters included in tariffs" is at issue, mandates that unless and until the Commission adopts mandatory Accelerated Docket treatment for all complaints raising "issues of competition in the provision of telecommunications services,"[13] at a minimum, such complaints must be afforded the benefit of the five-month resolution timeframe set forth in the *Report and Order*.

B. Expansion of the Scope of the *Report and Order* Does Not Obviate the Need for the Proposed Accelerated Docket Procedure

Smaller carriers, by competitive necessity, comprise the most innovative segment of the telecommunications market, providing increased service alternatives to small- to medium-sized businesses and the residential customers which are as yet seriously underserved by competitive providers. There is a critical need for even more expedited resolution of the formal complaints brought by these smaller carriers to remedy potentially discriminatory or other anticompetitive conduct by common carriers. While such complaints will often be related to "a rate, charge, term or condition of a particular service offering,"[14] they are always directly related to "issues of competition in the provision of telecommunications services"[15] and thus are always of critical significance to the ability of such carriers to continue to provide innovative telecommunications services to consumers.

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13 *Public Notice*, Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, DA 97-2178, ¶ 1 (released December 12, 1997).

14 *Report and Order*, FCC 97-396, at ¶ 83.

15 *Public Notice*, DA 97-2178, at ¶ 1.

As the Commission has noted, "development of robust competition for all telecommunications services requires that there be a means of swift and fair dispute resolution between competitors."[16] TRA fully agrees that allegations of unreasonably discriminatory conduct by telecommunications carriers, not merely those formal complaints subject to statutory deadlines mandated by Congress in the Telecommunications Act of 1996,[17] must be addressed -- and resolved -- expeditiously in order "to reduce impediments to robust competition in all telecommunications markets."[18] Nowhere is the need for prompt resolution of complaints more urgent than in the context of carrier-to-carrier disputes. Such complaints, as the Commission has recognized, often raise issues cutting to the very heart of a service provider's ability to enhance the array of service options available to consumers.

As TRA noted in its comments in support of the establishment of an accelerated docket procedure, a small carrier which is compelled to file a complaint for redress of anticompetitive of discriminatory conduct does so only as a last resort, knowing full well that every day which passes without resolution of the dispute is damaging, perhaps desperately so, to its ability to provide a competitive alternative for the satisfaction of the telecommunication needs of consumers. In far less than the five months mandated by the *Report and Order* for dispute resolution, a small carrier can be literally driven out of business through the refusal of an underlying service provider to live up to service commitments, to timely provision, to accurately bill, or to refrain from outright anticompetitive tactics to "win back" a competitive provider's new customer by means of CPNI misuse, deceptive marketing practices or abuse of

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16 *Public Notice*, DA 97-2178, at 1.

17 47 U.S.C. §§ 208, 260, 271, 275.

18 *Report and Order*, FCC 97-396, ¶ 2.

PIC-freeze procedures, or any of a host of other anticompetitive and discriminatory practices. TRA thus strongly disagrees with Airtouch's assertion that simply expanding the five-month *Report and Order* deadline to cover all formal complaints "largely renders unnecessary the Commission's recent inquiry into whether it should adopt 'Accelerated Docket' procedures for certain types of formal complaints."[19]

Rather, the Accelerated Docket procedure will continue to constitute a potent and formidable tool for the Commission in fulfilling its obligations under the Telecommunications Act of 1996 to foster the widespread availability of competitive telecommunications services to all consumers, providing a necessary avenue of relief not currently addressed by the Commission's formal complaint structure and which even a five-month resolution timeframe would insufficiently address. Thus, it is critical that the Commission establish the Accelerated Docket procedure irrespective of any modification to the *Report and Order* hereunder.

C. Discovery Mechanisms Should Remain Available to Complainant Carriers

MCI cautions the Commission that the inability of carriers to seek leave to engage in discovery in order to obtain production of documents, depositions and additional interrogatories as permitted pursuant to Section 1.730 of the Commission's Rules "will, in a significant number of instances, result in a party being unable to thoroughly document a claim or defense, notwithstanding the fact that the claim or defense is accurate."[20] TRA wholeheartedly agrees.

TRA argued in its comments and reply comments in this proceeding that a complainant's access to discovery tools sufficient to allow the full development of its claims

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19 Airtouch Petition, p. 13.

20 MCI Petition, p. 6.

against a defendant should not be diminished in any significant degree, and certainly should not be eliminated. As the Commission is aware, in many circumstances only the defendant carrier will possess essential factual information necessary to the resolution of a formal complaint. Inasmuch as implementation of the Commission's mandatory detariffing policy for nondominant interexchange carriers through the *Order* and *Order on Reconsideration* in CC Docket No. 96-61[21] may result in many cases in the total unavailability of either tariffs or information concerning rates or descriptions of service offerings, the ability to engage in discovery, indeed, to engage in discovery requests in excess of the number set forth in the streamlined formal complaint rules, simply to solicit the information necessary to fully substantiate the allegations contained in their complaints, will remain critical to a complainant's ability to realistically obtain relief. Deletion of Section 1.730 of the Commission Rules, under these circumstances, will oftentimes lead to the inequitable, and thus unacceptable result that complainants may be effectively prevented from pursuing legitimate claims of discrimination not only with respect to charges, classifications, regulations or practice contained in tariffs, but other forms of discriminatory or anticompetitive actions as well.

TRA agrees that modifications to the Commission's existing discovery rules should improve the ability of the Commission to resolve an increased number of complaints efficiently and quickly. Like MCI, however, TRA believes the wholesale removal of the ability of carriers to engage in extraordinary discovery pursuant to Section 1.730 is unwarranted precisely because carriers may be placed in the untenable position of having to comply with the Commission's fact-

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[21] TRA's petition for review of the Commission's Order on Reconsideration in CC Docket No.96-61 is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit, *sub.nom.*, Telecommunications Resellers Association v. FCC, Case No. 98-1001 (Jan. 5, 1998); this case has been consolidated with appeals of the Report and Order in this docket, *sub. nom.*, MCI Telecommunications Corp. v. FCC, Case No. 96-1459 (Dec. 2, 1996).

pleading requirements to avoid dismissal of a valid complaint while simultaneously being prevented from obtaining essential information from a defendant carrier which will possess no independent incentive to cooperate. TRA thus urges the Commission that its efforts to "carefully balance the rights of the parties and the need to expedite the resolution of complaints"[22] would best be served by retention of the "extraordinary" discovery mechanism of Section 1.730.

D. The Commission Should Refrain from Imposing Additional Pre-Filing Notification Requirements

TRA supports the *Report and Order*'s requirement that a complainant mail a certified letter outlining the allegations that form the basis of the complaint it anticipates filing with the Commission to the defendant carrier.[23] TRA opposes expansion of this notice requirement as requested by AT&T, however, since it will often be difficult or impossible for a complainant carrier to refute a defendant carrier's assertion of procedural infirmity based on the amorphous filing standard proposed; i.e., that both the defendant carrier's designated agent in the District of Columbia *and* "the defendant's representative that, to the best of complainant's knowledge, has decision making authority over the disputed matters or has been designated as the defendant's attorney regarding those matters."[24]

Because a defendant carrier's designated agent can be readily identified, a complainant's satisfaction of the *Report and Order*'s pre-filing notification requirements, as currently structured, can also be conclusively documented. In many instances, however, the individual empowered to make decisions over the disputed matters will not be easily identifiable

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22 *Report and Order*, FCC 97-396, at ¶ 115.

23 *Report and Order*, FCC 97-396, at ¶ 41.

24 AT&T Petition for Clarification, p. 2.

to a complainant carrier. The ambiguous standard put forth by AT&T will oftentimes leave complainant carriers vulnerable to claims that failure to satisfy the Report and Order's pre-filing notification obligations necessitates dismissal of the complaint. Additionally, the complainant carrier's knowledge of the appropriate individual to receive service of the pre-filing letter would become a routine matter of contention, working against, rather than facilitating the Commission's goal of streamlining the processing of formal complaints to "speed the resolution of all formal complaints, not just those covered by the 1996 Act."[25]

Even a large organization such as AT&T should possess sufficient internal knowledge of the identity of the individual with "decision making authority over the disputed matters" in a given circumstances, especially in light of the level of detail the Commission has indicated should be provided a defendant carrier prior to the filing of a formal complaint. Further, it can hardly be considered unreasonable to place an obligation upon a company's designated agent to promptly forward pre-filing notification of anticipated claims to the appropriate individual. Shifting to a complainant carrier, much less familiar with internal personnel and authority delegation by the defendant carrier, an obligation to seek out the appropriate individual to be served in a particular circumstance would erect an unnecessary hurdle to the filing of a formal complaint which is not justified by what would amount to only a slight procedural simplification for the defendant carrier.

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[25] *Public Notice*, "Federal Communications Commission's Revised Procedures for Filing Formal Complaints Against Common Carriers Become Effective March 18, 1998" (released March 9, 1998).

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission (i) to expand the scope of proceedings eligible for resolution within the five-month period set forth in the *Report and Order*; (ii) to nonetheless establish an Accelerated Docket procedure pursuant to which carrier-to-carrier disputes raising competitive issues may be resolved even more expeditiously; (iii) to retain the extraordinary discovery ability afforded by Section 1.730 of the Commission's Rules and (iv) to refrain from imposing additional pre-filing service requirements upon complainant carriers.

Respectfully submitted,

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March 18, 1998

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CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing Comments of the Telecommunications Resellers Association were served this 18th day of March, 1998, by United States First Class mail, on the following:

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